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No. 02-311

In The
SUPREME COURT OF THE UNITED STATES

KEVIN WIGGINS,
Petitioner,

v.

THOMAS R. CORCORAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MARYLAND CRIMINAL DEFENSE ATTORNEYS' ASSOCIATION AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit

[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. Rule 37.6.

organization founded in 1958 to improve the representation of the accused and to advocate the protection of constitutional rights in criminal cases. Through its state and local affiliates, NACDL represents more than 28,000 lawyers nationwide.

The National Legal Aid and Defender Association (NLADA) is a District of Columbia non-profit organization founded in 1911. NLADA's purpose is to promote the availability of legal services to individuals who are unable to afford counsel. NLADA's membership includes public defender programs, statewide defender commissions, assigned counsel programs, death penalty trial and post-conviction programs and law school criminal clinics across the nation. In 1988 NLADA developed standards for representation in capital cases that were subsequently adopted by the American Bar Association, including NLADA Standard 11.4.1 (requiring thorough investigation in preparation for both the guilt and penalty phases).

Because their members represent clients in serious criminal prosecutions, including capital cases, across the country, NACDL and NLADA have an interest in preventing the erosion of legal rules designed to assure fair adversary proceedings and trustworthy outcomes in those cases. Counsel's role in a capital sentencing hearing "is comparable to counsel's role at trial – to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The requirement at issue in this case, that defense counsel must base decisions in capital sentencing hearings as well as trials on a reasonable investigation, is a fundamental aspect of the Sixth Amendment right to the assistance of counsel and an important safeguard against unconstitutional death sentences. The experience of their members in capital trials also gives NACDL and NLADA a unique perspective on the reasonableness of the "tactical"

justification offered in this case for defense counsel's failure to conduct a reasonable investigation of Petitioner's background, depriving the sentencing jury of essential information about the justice of the sentence it was being asked to impose.

The Maryland Criminal Defense Attorneys' Association (MCDAA) is the Maryland affiliate of NACDL. MCDAA was formed to promote study and research in the field of criminal defense law and related areas; to disseminate knowledge by lecture, seminars and publications; to promote the proper administration of justice; to foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases. MCDAA has a significant interest in the quality of representation provided to the accused in capital cases in the State of Maryland. In addition, MCDAA is concerned that rulings by the United States Court of Appeals for the Fourth Circuit such as the decision below have tolerated representation in capital cases beneath any reasonable professional standard. This case is important to MCDAA because it offers the opportunity to reestablish *Strickland* as the benchmark for capital cases reviewed in the Fourth Circuit.

STATEMENT

It was clearly established at the time of Kevin Wiggins' trial that each juror in Maryland was entitled to consider "any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." See *Mills v. Maryland*, 486 U.S. 367 (1988) (unconstitutional to require unanimous agreement on mitigating circumstances). Also clearly established was defense counsel's duty to investigate the client's background for potentially mitigating information to present at sentencing. See JA 552-53; 563-64;

566-68; 573-74 (testimony of defense expert in post-conviction hearing); Report of the Governor's Commission on the Death Penalty: An Analysis of Capital Punishment in Maryland: 1978 to 1993, 74-75 (1993)[2]; American Bar Association, Standards for Criminal Justice: The Defense Function, 4-4.1, commentary at 4-55 (2d ed. 1980); American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guidelines 11.4.1(D)(2), 11.8.3, 11.8.6 (Feb. 1989). Practice in Maryland conformed to those standards. The district court found that Wiggins' counsel knew "it was a routine practice in the Maryland Public Defender's Office to retain an expert forensic worker to prepare a social history of capital defendants and that funds were available for that purpose." (Pet. App. 53a). The state court judge who held the hearing on Wiggins' motion for post-conviction relief had "never seen a case where there was not a social history prepared. This is the first one." (4/7/94 Tr. 55).

Under Maryland law, a jury's sentencing verdict of death in a capital case must be unanimous. If the jury does not agree, a life sentence is imposed. Md. Code Ann., Art. 27, § 413(k)(2). Based on information in a cursory state presentence investigation report, (JA 17-24; Pet. App. 135-36a), one or more members of Wiggins' sentencing jury found mitigation in his "background." (JA 409). The parties also stipulated to a statutory mitigating factor in the absence of a conviction for a crime of violence. (JA 367). The jury nevertheless sentenced him to death, concluding that the aggravating circumstance that the murder was in the course of

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[2] This document is available at http://www.prattlib.md.us/edocs/ocm29425415/ocm29425415.html.

a robbery outweighed the mitigating information. (JA 409-10).

As the district court found, there was much more about Kevin Wiggins' background the sentencing jury did not know. (Pet. App. 53-55a). Wiggins had been identified since childhood as borderline mentally retarded, with an IQ of 72. After his alcoholic mother physically abused and then abandoned him at age 6, he was placed in foster homes where he was physically and sexually abused. (Pet. App. 163-198a). A fuller account of Wiggins' life would have amplified the mitigating impact of a life history that at least one member of the sentencing jury found mitigating in its most perfunctory form. It would also have diminished the misleading impact the presentence report may have had on other members of the jury. Had the jury known Wiggins' full story, it would undoubtedly have interpreted differently Wiggins' capsule description of his background in the presentence report as "disgusting." The jury would have understood the reasons for the discrepancy between his account of foster care and his sister's account of a "nice home with a roof over our heads." Had the jury known about Wiggins' limited intelligence, it would have been more understanding of other aspects of the presentence report, such as his becoming "lost" in school before dropping out. The jury would also have been more favorably impressed with his employment history and his efforts to support himself despite his limited skills.

Despite the "routine practice" of the Maryland Public Defender's Office, and despite his lawyers' possession of social service records about Wiggins' upbringing, his lawyers did not prepare a history about him. Although the social service records provided enough information to demonstrate that further investigation would be fruitful, they omitted crucial facts, such as the physical and sexual abuse Wiggins suffered in foster care. See Pet. App. 54a, n.16 (finding by

district court that the Maryland Court of Appeals' decision affirming the denial of state post-conviction relief was based on misunderstanding about contents of social service records); Pet. App. 142a, n.269 (finding by state post-conviction judge that social service records did not contain reports of sexual abuse). Wiggins' lawyers did not look any further. Their defense in the penalty phase challenged whether Wiggins was eligible for a death sentence as a "principal" in the murder for which he had been convicted. The defense did not show that Wiggins had been an accomplice to a murder committed by others, however. *Wiggins v. State,* 324 Md. 551, 571-72 (1991). Instead, defense counsel sought to "retry" the guilt phase, knowing the jury would be instructed that it was bound by the earlier guilty verdict. (Pet. App. 51a; JA 485-86).

The district judge rejected the State's "tactical" justification for counsel's failure to perform a routine investigation:

> In fact, it appears that defense counsels' "tactical decision" was forced on them by inattention and lack of preparation. Before the trial, lead counsel had taken a new full-time job in another county, spent only "a day a week or so" attending to his former responsibilities, and left it to his co-counsel to do "most of the work." Here, the attorney left in charge had previously worked on one or two felony jury trials, had never before worked on a capital trial, and was "frankly overwhelmed" as the trial date approached.
> (Pet. App. 52a) (citation omitted).

Based on those findings, the district court ruled that Kevin Wiggins had been denied effective assistance of counsel in

his sentencing (Pet. App. 55a), and granted relief from his death sentence (Pet. App. 90-91a).[1]

The United States Court of Appeals for the Fourth Circuit reversed in three opinions. Judge Widener's opinion accepted as reasonable the judgment that "avoidance of conflicting arguments supported limited investigation into social history." (Pet. App. 23a). Thus, defense counsel's belief that he could successfully attack the evidence that Wiggins was eligible for a death sentence as a "principal" under Maryland law excused his failure to investigate mitigating information he knew or should have known existed in Wiggins' history. Chief Judge Wilkinson concurred, expressing a lack of certainty as to Wiggins' guilt, but concluding that while reservations about "the lack of total certitude" should be a consideration in granting executive clemency, they did not undermine the judgment for purposes of relief under 28 U.S.C. § 2254. Judge Niemeyer also concurred, describing his decision concerning ineffective assistance as "a closer call," than the decision as to whether the evidence was sufficient to convict. (Pet. App. 25a). Acknowledging that his colleagues were satisfied with the reasonableness of the decision not to investigate on tactical grounds, Judge Niemeyer explained his reservations:

> It appears to me, however, that counsel could have had it both ways. He could have insisted on arguing liability and still have maintained

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[1] The district court also granted relief from the judgment of conviction, concluding that the Maryland Court of Appeals had unreasonably applied the constitutional standard for sufficiency of the evidence. (Pet. App. 42-55a). The Fourth Circuit overturned that ruling as well. (Pet. App. 12-17a). This Court's grant of certiorari was limited to the second question presented in Wiggins' petition, relating to the ineffective assistance of counsel at sentencing.

> that any sentence of death would be inconsistent with the mitigating circumstances of Wiggins' miserable upbringing and marginal intelligence. *Id.* 25-26a.

Nevertheless, he concluded there was "support in the record to conclude that Wiggins' counsel's decision was a tactical one and that it was not an unreasonable strategy to pursue." *Id.* 26a. On that basis, he concurred in holding that the Maryland Court of Appeals did not unreasonably apply the *Strickland* standard. *Id.*

SUMMARY OF THE ARGUMENT

All of the safeguards imposed to prevent the arbitrary infliction of the death penalty depend on "the adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The diligence and vigor of defense counsel determine whether facts that may show the defendant's innocence are uncovered, and whether the legal rules that channel sentencing discretion are fairly applied. But there is no safeguard more dependent upon defense counsel's faithful discharge of his office than the requirement that "punishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989). It is up to the lawyer for the accused to expose the "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Unless that occurs, a death sentence is not a "reasoned moral response" to the offense and the offender. *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 1920 (2001).

Decades of experience have shown that "in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a reasonably substantial,

independent investigation into potential mitigating circumstances." *Neal v. Puckett*, 286 F.3d 230, 236-37 (5th Cir. 2002) (en banc). Without such an investigation, facts that are crucial to understanding and to judging the blameworthiness of the offender will remain hidden. See, e.g., *Williams v. Taylor*, 529 U.S. at 398-99; *id.* at 415-16 (O'Connor, J., concurring). While there is room for professional judgment about what information to present to the jury and how to present it most effectively, a broad investigation of the defendant's life is a precondition of those professional judgments. Otherwise, counsel's failure to investigate becomes the wild card that trumps the jury's ability to render and the judiciary's ability to ensure death sentences that are morally defensible within the framework of this Court's precedents.

Kevin Wiggins' lawyers failed in their duty to investigate his background and deprived the sentencing jury of the information it needed to apply the law fairly to the crime of which he was convicted. The "tactical" justification for their dereliction accepted by the court below is an unreasonable application of this Court's holding in *Strickland* for three related reasons. *First*, as a general matter, it is not reasonable to decide not to investigate mitigating background information just because the defense lawyer plans to contest some aspect of the defendant's guilt in the sentencing phase. The decision below increases the risk of erroneous death sentences in those cases in which the risk of erroneous conviction is greatest. *Second*, in this case it was not reasonable to make a tactical judgment for the purpose of avoiding "conflicting arguments" without investigating to determine whether there was a conflict. Had Wiggins' lawyers investigated, they would have realized there was none. *Third*, it was not reasonable to "retry guilt" in the sentencing phase instead of presenting the readily discoverable mitigating information about Wiggins'

deplorable upbringing. An investigation would have produced far more compelling reasons to spare Kevin Wiggins' life than the quixotic attempt to persuade the sentencing jury to disregard the fact of his conviction in defiance of jury instructions that the defense conceded the jury had to follow.

ARGUMENT

THE FAILURE TO INVESTIGATE WIGGINS' BACKGROUND WAS UNREASONABLE AND INCOMPATIBLE WITH THE DUTIES OF COUNSEL IN A CAPITAL CASE

Kevin Wiggins' lawyers unreasonably decided not to present mitigating information about his background without conducting an adequate investigation to gather the facts. As in *Williams v. Taylor*, 529 U.S. 362 (2000), "the graphic description of [Wiggins'] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." 529 U.S. at 398. Had they done a reasonable investigation, Wiggins' lawyers would have discovered facts that could have had a tremendous impact on the sentencing jury, without foreclosing a challenge to the "principal" requirement. Their failure to investigate is not excused as a tactical decision because they could not know whether Wiggins' background would support or conflict with their planned defense or weigh the tactical alternatives without investigation.

The basic ethical duty of a lawyer in a capital case thoroughly to investigate his client's background was articulated in professional standards,[4] training manuals

[4] See, e.g., American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,

Footnote cont'd

developed to aid lawyers in capital cases,[5] and caselaw[6] at the time of Kevin Wiggins' trial. A Subcommittee of the Defender Services Committee of the Judicial Conference recently summarized the responsibilities of a defense lawyer in a capital case in this way:

> In addition to defending against the prosecution's case for a death sentence, counsel must present a case for a lesser sentence. In order to effectuate the defendant's constitutional right to present any information in mitigation of sentence, counsel must conduct a broad investigation of the defendant's life history. "Although it makes no express demands on counsel, the [right to offer mitigating evidence] does nothing to fulfill its purpose unless it is understood to

Footnote cont'd

Guideline 11.4.1(C), *available at* http://www.nacdl.org/DEATH/guidelines.pdf.

[5] See, e.g., 3 Anthony Amsterdam, Trial Manual 5 for the Defense of Criminal Cases ¶ 468-A at 307 (1989).

[6] See, e.g., *Blake v. Kemp*, 758 F.2d 523, 534 (11th Cir. 1985). It is possible, however, that language in the Maryland Court of Appeals' decision in *State v. Tichnell*, 306 Md. 428, 453-56 (1986), may have misled counsel to believe that the duty to investigate the defendant's background was limited to evidence that would establish the statutory mitigating circumstance of "substantial impairment," rather than the full range of evidence contemplated by this Court's precedents. That legal error would not make counsel's failure reasonable. See *Williams v. Taylor*, 529 U.S. at 395 (counsel's legal error regarding admissibility of mitigating evidence was not a valid basis for failing to investigate). Moreover, investigation of Wiggins' background was plainly important to developing mitigation based on substantial impairment.

presuppose the defense lawyer will unearth, develop, present and insist on consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'" Indeed, one of the most frequent grounds for setting aside state death penalty verdicts is counsel's failure to investigate and present available mitigating information. The broad range of information that may be relevant to the penalty phase requires defense counsel to cast a wide net in the investigation of any capital case. Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Representation, p.6 (May 1998) (footnotes omitted).[7]

Wiggins' lawyers did not fulfill their duty. They obtained official records of his time in foster care. Those records revealed enough about the treatment Kevin Wiggins received at the hands of a succession of adults responsible for his care that no lawyer could have failed to recognize their potential to persuade a jury to spare his life. The records also showed evidence of borderline mental retardation in early childhood. Maryland law enacted shortly before Wiggins' trial barred imposition of the death penalty on the mentally retarded. Md. Code. Ann. Art. 27, § 412(f)(1) (1989). That is strong evidence that a Maryland jury would have considered even borderline intelligence as mitigation of the offense.

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7 This document is available at http://www.uscourts.gov/dpenalty/4REPORT.htm. Although the report involves the costs of representation in federal death penalty cases, its description of the function of defense counsel is based on and extends to state death penalty cases. *Id.*

With the records as a starting point, a competent lawyer would have gathered additional records, interviewed witnesses who could add to Wiggins' life history, and identified experts who could help explain Wiggins' background to the sentencer. ABA Guideline 11.4.1(D). Had they done so, Wiggins' lawyers could have presented reasons to spare his life that were even more compelling than the case presented in the state post-conviction proceedings, because it would have been even easier to locate witnesses who could bring Kevin Wiggins' upbringing to life than it was years later when post-conviction counsel began the search. Instead, they allowed the superficial and misleading description of Wiggins' life history in the state presentence investigation report to guide the jury's "reasoned moral response" to the crime.

A. A Strong Defense to Guilt Does Not Excuse Failure to Investigate Mitigating Information.

The Fourth Circuit below accepted the argument that Wiggins' lawyers were reasonable in failing to investigate his background because of their decision to challenge his eligibility for a death sentence as a principal under Maryland law. The court upheld a "tactical" choice made in ignorance solely because it avoided potentially "conflicting arguments," about guilt. The Fourth Circuit's decision amounts to a per se rule that a lawyer is not required to investigate mitigating information in the defendant's background in a case in which the lawyer plans to contest aspects of the defendant's guilt in the sentencing phase. This leads to the unacceptable result that a sentencing judge or jury will be given less reason to spare the life of a defendant for whom there remains doubt about guilt, than for a defendant whose guilt is unquestioned. While there may be situations in which an experienced trial lawyer might choose, after consulting with the client, to limit

the defense presentation in the penalty phase to contesting an aspect of the offense that is a requirement for death eligibility or an aggravating circumstance, these decisions must be based on a full investigation of the facts, rather than on a preconception that no background information, no matter how potent, would be worth presenting in combination with or instead of a challenge to aspects of the offense.

Affirmance of the Fourth Circuit's decision would undermine the *Strickland* standard in cases where there is doubt about guilt and would create a potentially vast loophole in the body of this Court's precedents assuring that sentencers in capital cases consider relevant mitigating evidence. See, *e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986). A lawyer's failure to investigate, no less than barriers to the consideration of mitigating evidence imposed by statute, or by the sentencing court, or by an evidentiary ruling, "risks erroneous imposition of the death sentence." *Mills v. Maryland*, 486 U.S. at 366 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 117 n.)(O'Connor, J., concurring)). It would be tragic to increase the risk of erroneous death sentences in cases in which there is also a risk of an erroneous conviction.

Virtually every capital sentencing scheme offers some opportunity to relitigate guilt or innocence in the penalty phase. In Maryland, this can take the form of a challenge to death-eligibility as a principal, as Wiggins' lawyers chose to do. But even if that were not the case, the defense could have contested the aggravating circumstance that the murder was in the course of a robbery, as the gist of Wiggins' defense in both phases of the trial was that the victim died a day after he came into possession of her property. In other states and under federal law, there are other offense-based aggravating circumstances that the jury must find in the penalty phase,

and other statutory and non-statutory requirements for death eligibility, such as the determination of personal responsibility for the murder required under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). A stated decision to "retry guilt" (Pet. App. 51a), cannot excuse a failure to explore mitigating evidence in the defendant's background when – as in this case – there is no "reason to believe that pursuing [such an investigation] would be fruitless or even harmful." *Strickland*, 466 U.S. at 691.

Even worse, the Fourth Circuit's reasoning would also excuse a lawyer from investigating the defendant's background in a case in which guilt is hotly contested and the same jury hears the guilt and penalty phases. By the logic of the decision below, a lawyer who hoped to avoid a death sentence based on lingering doubt about guilt could invoke that tactical choice as a reason not to investigate background information that would dilute the jury's focus on guilt or innocence.

"Judicial scrutiny of counsel's performance must be highly deferential," *Strickland*, 466 U.S. at 689, but only when it is within professional norms. There can be no question here, however, that the decision not to investigate Wiggins' background was outside the "wide range of reasonable professional assistance." *Id.* The state court judge who held the post-conviction hearing immediately recognized that counsel's conduct was far outside the norms of practice in capital cases. (4/7/94 Tr. 66). Although he later concluded in his written opinion that Wiggins was not entitled to relief, that decision was based on the same blanket acceptance of counsel's asserted trial tactics that underlies the Fourth Circuit's ruling. See Pet. App. 155a ("Numerous cases state emphatically that when . . . the decision not to investigate, etc., is a matter of trial tactics, there is no ineffective assistance of counsel."). To the contrary, "strategic choices

made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691. Wiggins' lawyers had the time and the resources to investigate his background without short-changing other aspects of the defense. Nothing in the Fourth Circuit's decision identifies a "reasonable professional judgment" justifying counsel's failure to investigate in this case.

B. The Mitigating Evidence of Petitioner's Background Was Not Incompatible With a Challenge to Death Eligibility as a Principal.

The Maryland Court of Appeals' decision upholding Wiggins' sentence was an unreasonable application of *Strickland* because it never explained how fully investigating Wiggins' background would have undermined the sentencing phase defense counsel chose; why that choice was reasonable without conducting a routine investigation into the alternatives;[1] and how the evidence about Wiggins' background would have hurt the attack on his death-eligibility as a principal. See Pet. App. 126a. The Maryland Court of Appeals ruled that Wiggins' lawyers could dismiss his life history as a "distraction" from the defense that he was not a principal, *id.*, but they could not have done so under *Strickland* without knowing what his history was and

[1] In part, the Maryland Court of Appeals decision was based on a misunderstanding of the facts. As the district court found, the Department of Social Services records did not document abuse, as the Court of Appeals believed. The district court's finding was not disputed on appeal and is not clearly erroneous. See *Amadeo v. Zant*, 486 U.S. 214, 223-225 (1988) (district court's factual finding that counsel failed to challenge racial discrimination in the jury because of concealment by local authorities rather than for tactical reasons was binding).

assessing its potential value as mitigation. Beyond this, the Maryland Court of Appeals observed that, "the dysfunctional and abused childhood defense is not always successful." *Id.* But that generality proves nothing about what was reasonable for Kevin Wiggins' lawyer to do *in this case*. Surely *Strickland* does not allow a lawyer to omit a routine investigation because the defense evidence it might yield is not "*always* successful."

The premise of counsel's explanation for foregoing a routine investigation of Kevin Wiggins' background was that the presentation of this information, no matter what the investigation revealed, would be incompatible with his predetermined decision to contest Wiggins' responsibility as a principal in the homicide. That explanation is plausible only if any mitigating information in Wiggins' background would *necessarily* implicate him as a principal.[2] As the district court found, however, "mitigating information of Wiggins' vulnerability and limited intelligence would not have been strategically inconsistent with 'retrying guilt' during the sentencing phase. Indeed, it would seem that skillful counsel would have been able to mesh these facts into an effective

[2] By contrast, in *Burger v. Kemp*, 483 U.S. 776, 793 (1987), the lawyer conducted a much more extensive investigation of Burger's background than Wiggins' lawyers did. Burger's attorney made an informed decision not to present the information he had obtained, fearing that cross-examination "might be literally fatal." Even the new information obtained by post-conviction lawyers was "by no means uniformly helpful to [Burger] because they suggest violent tendencies that are at odds with the defense's strategy" of attributing the crime to the co-defendant's influence. *Id.* See also *Darden v. Wainwright*, 477 U.S. 168 (1986) (defense presentation of mitigating information would have opened the door to damaging rebuttal); *Bell v. Cone*, 122 S.Ct. 1843 (2002) (defense counsel made strategic decision to rely on mitigating evidence presented in the guilt phase and to waive closing argument to avoid harmful cross-examination and rebuttal argument).

argument that Wiggins had been made the pawn of others who were responsible for the murder." (Pet. App. 55a, n.17); see also 4/7/94 Tr. 72 (state post-conviction judge notes that mitigating evidence was not incompatible with "double dip" strategy). The facts counsel would have uncovered through a routine investigation demonstrated that Wiggins was readily susceptible to manipulation and exploitation by others, just as he had been sexually exploited and pledged to silence by a foster father and Job Corps worker. This would have bolstered, not weakened, an argument that Wiggins had acquired the proceeds of robbery and murder that had been committed by someone else. The district judge concluded that "this hypothesis is not wholly conjectural or entirely implausible," based on the following evidence:

> One of the brothers of Wiggins' girlfriend, Geraldine Armstrong, had an apartment directly under the apartment of Ms. Lacs. Further, the trial testimony disclosed that another of Armstrong's brothers was involved in an angry confrontation with Armstrong and Wiggins on the evening of Thursday, September 15. It may be that if the robbery and murder occurred late in the afternoon or early in the evening of that day, one or both of the brothers may have been involved. Or it may be that Wiggins (who the record reflects was borderline mentally retarded) pilfered Ms. Lacs's keys and credit cards on Thursday afternoon, and that one or both of the brothers later returned to her apartment with the keys (borrowed or taken from Wiggins) and, in the course of looking for more loot, committed the murder. (Pet. App. 44a, n.9).

Wiggins' counsel offered no specific reason why the information gleaned from his background was incompatible with his chosen strategy of retrying guilt. [10]

Judge Niemeyer saw that "counsel could have had it both ways. He could have insisted on arguing liability and still have maintained that any sentence of death would be inconsistent with Wiggins' miserable upbringing and marginal intelligence." (Pet. App. 25a). Moreover, as the district court explained, "[t]he absence of a criminal record presumably would have dispelled any fear that counsel would have had that presentation about Wiggins' background would have been detrimental to him in terms of 'future dangerousness.'" (Pet App. 55a, n. 17). For the same reason, there was little risk that exposing the jury to Wiggins' unfortunate background would have undercut a lingering doubt argument by suggesting a propensity to commit a crime like the homicide charged. Certainly Wiggins' lawyers could not dismiss the potential value of mitigating evidence drawn from their client's life sight unseen.

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[10] The testimony in the post-conviction hearing that counsel failed to investigate Wiggins' background because of a tactical decision to retry guilt is contradicted by the record. Wiggins' lawyers did not plan to rely exclusively on their challenge to his responsibility as a principal in the penalty phase. Beforehand they requested a bifurcated sentencing hearing, so that they could address the principal issue first, before turning to "aspects of his life history, including a diagnosis of personality disorder, including a diagnosis of some retardation," that were not relevant to liability as a principal. (JA 34-52). Even after the judge denied a bifurcated hearing, counsel told the jury in opening that Wiggins "has had a difficult life," but had still been a productive member of society with no prior convictions. (JA 72). They also called an expert to testify concerning Wiggins' potential adjustment in prison if sentenced to life imprisonment rather than death. (JA 306-40). The defense also proffered the testimony of a psychologist that Wiggins was "childlike" and ineffectual, with a low IQ, but chose not to call him because the court had denied the request to bifurcate. (JA 348-51).

C. The Decision to Forego Mitigating Evidence To Retry Guilt was Unreasonable.

Even assuming that Wiggins' lawyers faced a choice between challenging his guilt as a principal and offering mitigation evidence, it was unreasonable for them to make that choice without a reasonable investigation of the alternative. *Strickland*, 466 U.S. at 691.[11]

Before trial, Wiggins' lawyers faced evidence linking Wiggins to items taken from the victim's apartment: her car, credit cards, and an engagement ring. Each of these links depended to some degree on the testimony of Geraldine Armstrong, who had been arrested with Wiggins and charged with first degree murder. The lawyers were unsuccessful at demonstrating that Armstrong had been promised immunity to testify against Wiggins or mounting a serious challenge to her credibility. Her testimony that Wiggins drove the victim's car to her house on September 15, and then took Armstrong shopping with stolen credit cards connected Wiggins to the victim's property on the same day that he had been working near her apartment. The defense theory therefore hinged on proving that the victim was still alive on the following day, so that while Wiggins might be guilty of theft or receiving stolen property, he could not be guilty of murder. That argument turned on the testimony of a friend who recalled speaking to the victim on the 16th, and on medical testimony concerning time of death. Although at one time it may have appeared

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11 In *Strickland*, the tactical choice to throw the defendant upon the mercy of the sentencing judge was made by the defendant himself, after he confessed to two murders, waived a jury trial on guilt, and waived an advisory sentencing jury against the advice of counsel. 466 U.S. at 672-73. Counsel's decision to limit his investigation was reasonable, given the choice of strategy dictated by his client's actions.

that the defense would present undisputed testimony as to a time of death after September 15, that hope was scuttled before trial, when the medical examiner who performed the autopsy changed her estimated time of death. (JA 525-30). The defense also lost its expert witness, and had to scramble to find a substitute who had limited availability. (JA 534).

After the judge found Wiggins guilty, defense counsel asked for a continuance of the sentencing because the "defense has not completed its preparation to take this case to a sentencing phase." (JA 33). Counsel proffered that they had "many things to do, including examination of Wiggins by various experts." *Id.* The court granted the continuance with the prosecutor's consent. *Id.* At that point, counsel had ample opportunity to re-evaluate their strategy, and ample time to perform an investigation of mitigating evidence.

There were some obvious disadvantages to retrying guilt in the penalty phase. The most basic was the instruction to the jury that Wiggins had been convicted and that the jury was bound by that verdict. (JA 53; 362); see also JA 67(argument in support of motion for new trial discounting significance of jury verdict in penalty phase because it was bound by the guilt phase verdict). That instruction effectively nullified Wiggins' penalty phase defense, because his counsel offered no theory on which he could have been guilty of murder, but not be a principal. (JA 391)(closing argument)("you can't be sure that Kevin Wiggins had any role at all."). Thus, rather than a genuine challenge to the "principal" requirement, the penalty phase defense was really, as the trial prosecutor put it, a "back door" lingering doubt argument. (4/7/94 Tr. 66). See also JA 504-5 (explaining jury waiver to get "two shots at the principal issue."). As such, it was doomed to failure, because the sentencing jury had not decided guilt or innocence. Unlike a jury that had to wrestle with the liability determination in the guilt phase,

which may be inclined towards a life sentence because of lingering doubts about guilt, Wiggins' jury had no way of knowing what evidence had been presented in the guilt phase, or whether there were any reasons to doubt Wiggins' guilt. Counsel's decision to waive a jury trial in the guilt phase was at odds with a penalty phase defense premised on lingering doubt.[12]

Nor was it reasonable for defense counsel to retry guilt before a sentencing jury without at least considering the alternatives. Having decided to waive a jury trial in the guilt phase because of a belief that a death-qualified Baltimore County jury would be unreceptive and unfair, (JA 500), counsel could not have believed that it would be advantageous to retry guilt in the same forum they deliberately avoided earlier. The Maryland Court of Appeals was unreasonable in relying on the change in sentencer as a basis for distinguishing the many cases holding counsel ineffective for failing to investigate their clients' backgrounds. See Pet. App. 124a. Whatever force counsel's concerns about the composition of the jury pool and the process of death qualification may have carried in the guilt phase carried the same force in a penalty phase focused on guilt as a principal.

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12 Wiggins' lead counsel had been involved in only one prior capital case. (JA 474). In that case, he also tried the guilt phase to a judge and then challenged the principal finding in a jury trial. In *Doering*, however, there was no real dispute about guilt based on the defendant's confession, and a real dispute over who was the principal because another person was charged and convicted of participating in the homicide. See *Doering v. State*, 313 Md. 384 (1988). It may be that counsel simply recapitulated his strategy in the earlier case, even though that client was also sentenced to death.

There were other disadvantages to a retrial strategy as well. The prosecution, having had a preview of the defense, was able to strengthen its reprise presentation in the sentencing phase. The prosecution omitted the two jailhouse informants whose testimony the trial judge discredited and rejected entirely. It was able to elicit an in-court identification of Wiggins from a witness who saw him outside the victim's apartment, which it had been unable to do in the guilt phase. And it presented stronger expert testimony concerning the time of death. The defense, by contrast, had nothing to offer that it had not offered in the guilt phase.[13] Another disadvantage was that the wholesale attack on Wiggins' guilt allowed the prosecution to retry its case before the jury, including emotionally charged photographs of the crime scene and the victim that might not have been admissible in a hearing focused on Wiggins' background.

It was not reasonable for Wiggins' lawyers to choose the long odds of asking the sentencing jury to disagree with the guilt phase verdict without thoroughly investigating the alternatives. As discussed in the preceding section, in reality counsel's strategy was compatible with the presentation of Wiggins' background. But Wiggins' lawyers did not know that because they failed to look.

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13 The defense called a new expert on time of death, but this was for reasons of availability.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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